

ESTTA Tracking number: **ESTTA598739**

Filing date: **04/15/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204861
Party	Defendant Jean Pierre Biane
Correspondence Address	Paulo A. de Almeida Patel & Almeida, P.C. 16830 VENTURA BLVD SUITE 360 ENCINO, CA 91436 UNITED STATES Paulo@PatelAlmeida.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Alex Patel
Filer's e-mail	Paulo@PatelAlmeida.com
Signature	/Paulo A. de Almeida/
Date	04/15/2014
Attachments	Applicant's Motion for Judgment on the Pleadings_ANDALE.pdf(105376 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,)	
)	
Opposer,)	Opposition No.: 91-204,861
)	Serial No. 79/108,168
)	Mark: ANDALE! ENERGY DRINK
v.)	(& Design)
)	
JEAN PIERRE BIANE, and)	Opposition No.: 91-210,860
ANDALE ENERGY DRINK CO., LLC)	Serial Nos. 85/646,316, 85/646,359
)	Marks:
)	ANDALE! & Design (Ser. No. 85/646,316)
Applicants.)	ANDALE! & Design (Ser. No. 85/646,359)
)	

APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

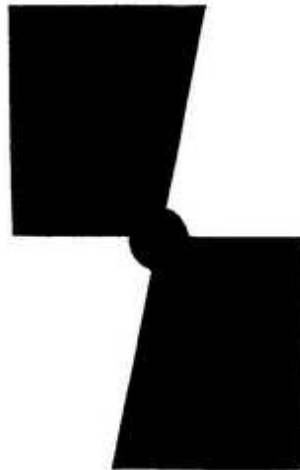
Applicant Andale Energy Drink Co., LLC ("Applicant") hereby moves for partial judgment dismissing the instant opposition against application serial no. 85/646,359 pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the ground that, as a matter of law, the mark ANDALE! (& Design) is not confusingly similar in appearance, sound, meaning, or commercial impression to the mark of Reg. No. 2829269 pleaded by Opposer, Red Bull Gmbh ("Opposer"). Further, because the marks are completely dissimilar, Opposer's second claim for false suggestion of a connection under Section 2(a) fails as a matter of law and should be dismissed with prejudice as to Ser. No. 85/646,359.

Statement of Facts

Applicant seeks to register the mark ANDALE! (& Design) for "Non-alcoholic beverages, namely, energy drinks, energy shots, sports drinks, soft drinks, and bottled water" in Class 32, Serial No. 85/646,359 (hereinafter, "Applicant's Mark"), with the mark depicted as follows:



Opposer filed a Consolidated Notice of Opposition challenging this application¹ alleging the mark therein is likely to cause confusion with its design mark of Reg. No. 2829269, which "covers" "Non-alcoholic beverages, namely, soft drinks, sports drinks, energy drinks" in International Class 32 ("Opposer's Mark"), with the mark depicted as follows:



Consolidated Notice of Opposition, at ¶¶ 2, 14-18.

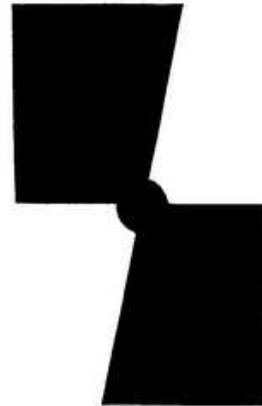
A simple comparison of the visual features of the marks shows that they are utterly dissimilar in appearance, sound, meaning, and commercial impression, which precludes a finding

¹ The Consolidated Notice of Opposition also contains a challenge to a different mark of Ser. No. 85/646,316. Applicant does not address Ser. No. 85/646,316 in this Motion.

of likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). For ease of comparison, the marks are displayed together as follows:



(Applicant's Mark)



(Opposer's Mark)

Even viewing all other DuPont factors in Opposer's favor—and Applicant concedes them for the purposes of this motion—the dissimilarities between the marks are so great as to avoid likelihood of confusion. The Board may reach this conclusion based on a consideration of the dissimilarity of the marks alone. See *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991)(single du Pont factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant's favor, would not be material because they would not change the result). Further, the marks are so dissimilar as to preclude a finding of false suggestion of a connection under Section 2(a). Accordingly, Applicant's Motion for Partial Judgment on the Pleadings should be granted, and the opposition should be dismissed with prejudice as to Ser. No. 85/646,359.

Legal Standard

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well pleaded factual allegations of the non-moving party must be

accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Fed. R. Civ. P. 8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. *Baroid Drilling Fluids Inc. v. SunDrilling Products*, 24 USPQ2d 1048 (TTAB 1992). All reasonable inferences from the pleadings are drawn in favor of the nonmoving party. *Id.* A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law. *Id.*

The Marks Are Dissimilar in Appearance, Sound, Meaning, and Commercial Impression

The Lanham Act prohibits registration of a mark on the Principal Register that would create a likelihood of confusion. 15 U.S.C. § 1052(d). Whether a mark is likely to cause confusion under Section 2(d) is a question of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1565, 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987); *Monarch Marking Systems, Inc. v. Elan Systems, Inc.*, 39 U.S.P.Q.2d 1035 (TTAB 1996); *Blansett Parmacal Co. Inc. v. Carmic Laboratories, Inc.* 25 U.S.P.Q.2d 1473, 1476 (TTAB 1992); *Blue Cross and Blue Shield Ass'n v. Harvard Community Health Plan, Inc.*, 17 U.S.P.Q. 1075 (TTAB 1990).

"[O]ne DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." See *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, *supra* (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736

(Fed. Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). See also *Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive); *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

Here, the marks are completely different in appearance, sound, meaning, and commercial impression, which precludes a finding of likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). Further, Applicant respectfully submits that it has adequately met its burden in establishing the absence of any genuine issues of material fact. The circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single DuPont factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion. For the purposes of this motion, the Board may even consider the other DuPont factors, such as the relationship between the goods and the alleged fame of Opposer's mark, in Opposer's favor. By Applicant's concession of these other factors, they are not in dispute. Even viewing all other DuPont factors in Opposer's favor, the dissimilarities of the marks is so great as to avoid likelihood of confusion.

1. Appearance

It is instantly clear that Opposer's Mark and Applicant's Mark of Ser. No. 85/646,359 are dissimilar in appearance. Applicant's Mark features a soccer player kicking ball and the word ANDALE! across a rectangular flag background consisting of shaded streaks with one un-shaded, diagonal streak across the center. There is no dispute that none of these features are present in

Opposer's Mark. Because the marks do not share any of these features, the marks are not similar in appearance, and confusion is not likely as to Ser. No. 85/646,359.

2. Sound

The marks are completely different in sound. Opposer's Mark is a design mark and does not have a sound. Applicant's Mark contains the word element ANDALE! and thus has a sound which is not shared by Opposer's Mark. Accordingly, the marks are dissimilar in sound.

3. Meaning

The marks are completely different in meaning and connotation. Applicant's Mark contains the word ANDALE!. Opposer's Mark does not contain this word and therefore cannot convey a meaning or connotation similar to "ANDALE!". Nor does Opposer's Mark contain a soccer player or a ball. Accordingly, the marks are dissimilar in meaning.

4. Commercial Impression

Applicant's and Opposer's marks create completely different commercial impressions. Applicant's Mark creates the impression of a soccer player kicking a ball and the call to action "ANDALE!" and shows a flag with diagonal streaks. Opposer's Mark does not contain any of these elements and does not create a similar commercial impression. Overall, the marks are dissimilar in appearance, sound, meaning, and create dissimilar commercial impressions. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, supra (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) (court affirms Board dismissal of opposition based on dissimilarity

of the marks PECAN SANDIES and PECAN SHORTEES). See also *Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive) and *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

In view of the clear differences between the marks, there is no likelihood of confusion as a matter of law. The Board may reach this conclusion solely by comparing the marks for dissimilarities in appearance, sound, meaning, and commercial impression. It is beyond dispute that Applicant's and Opposer's marks contain completely different features. The differences are so great as to preclude a likelihood of confusion under Section 2(d). The differences between the marks are also so great as to preclude a finding of false suggestion of a connection under Section 2(a). Accordingly, the Notice of Opposition should be dismissed as to Ser. No. 85/646,359.

Conclusion

Based on the foregoing, Applicant's Motion for Partial Judgment on the Pleadings should be granted, and the opposition should be dismissed with prejudice as to Ser. No. 85/646,359.

Respectfully submitted,

Date: April 15, 2014

/Paulo A. de Almeida/
Paulo A. de Almeida
Alex D. Patel
Patel & Almeida, P.C.
16830 Ventura Blvd., Suite 360
Encino, CA 91436
(818) 380-1900

Attorneys for Applicants,
Andale Energy Drink Co. LLC, and
Jean Pierre Biane

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** has been served on Martin R. Greenstein, counsel for Opposer, on April 15, 2014 via First Class U.S. Mail, postage prepaid to:

Martin R. Greenstein
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273

/Paulo A. de Almeida
Paulo A. de Almeida